



**Ratemo v Uzuri Foods Limited (Cause 1724 of 2017)  
[2022] KEELRC 3889 (KLR) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3889 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1724 OF 2017  
SC RUTTO, J  
SEPTEMBER 16, 2022**

**BETWEEN**

**JARED NYAKWEBA RATEMO ..... CLAIMANT**

**AND**

**UZURI FOODS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant brought the instant suit *vide* a memorandum of claim dated August 31, 2017 through which he avers that he was employed by the respondent on June 15, 2015 as a boiler operator. He avers that he received a letter of summary dismissal on October 15, 2016 on unsubstantiated allegations that he had taken an extra overall from the store. According to the claimant, his dismissal was unlawful, unfair and against the provisions of the *Constitution*, the *Employment Act*, the principles of natural justice and the tenets of fair labour practices. This he avers, is on account that; he had done nothing wrong to warrant his dismissal; there was no plausible reason given for his dismissal; no investigations were carried out; and no hearing took place for him to defend himself. It is for this reason that the claimant prays for the sum of Kshs 263,900/= as compensation.
2. The respondent opposed the claim and averred that the claimant was dismissed on grounds that he was in possession of a stolen overall belonging to one Matthew Kyalo, which he later sold to Philip Maina for Kshs 200/=. The respondent thus avers that it had a valid reason to dismiss the claimant. Consequently, the respondent has asked the court to dismiss the claim with costs.
3. The matter proceeded for hearing on May 19, 2022, with each side presenting oral evidence.

**Claimant's Case**

4. To start with, the claimant adopted his witness statement and the bundle of documents filed together with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before court.



5. It was the claimant's testimony that there were various complaints from the management that firewood was being consumed at a very high rate, to which he gave an explanation for. That in this regard, he explained through his written statement to the respondent, that his boss was ordering five carloads of wood but only one would be received. That the respondent's director by the name Mr Ashok, promised to carry out investigations.
6. In further testimony, the claimant stated that on October 15, 2016, he received a dismissal letter on unsubstantiated allegations that he had taken an extra overall from the store. That this was after he had requested for a joint meeting with the general manager. That his request was turned down and he was not given an opportunity to defend himself.

### **Respondent's Case**

7. The respondent's testimony was presented through Ms Quinter Akoth Ouma, who testified as RW1. She identified herself as the respondent's human resource manager. RW1 adopted her witness statement and the respondent's bundle of documents to constitute her evidence in chief. She also produced the documents filed on behalf of the respondent as exhibits before court.
8. RW1 testified that in the month of September, 2016, the respondent noticed a huge variance in the amount of firewood that was being consumed. That the claimant was issued with a show cause letter to which he responded unsatisfactorily. That disciplinary action was stayed as investigations continued. That the claimant was soon thereafter involved in disciplinary issues when he stole his colleague's overall and sold it to another person for the sum of Kshs 200/=. That in this regard, he was issued with a show cause letter dated October 3, 2016. That the written statements by Matthew Kyalo and Philip Maina Kariuki confirmed that the claimant was involved in the theft of the said overall and its subsequent sale. That the claimant's conduct was unbecoming hence his dismissal.

### **Submissions**

9. It was submitted on behalf of the claimant that no valid reasons were given prior to his dismissal and the theft allegations were not substantiated. That further, he was not subjected to any disciplinary hearing to accord him a chance to defend himself. That his termination was therefore unfair. To buttress the claimant's submissions, several authorities were cited including, *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, *David Gichana Omuya v Mombasa Maize Milers Ltd* [2014] eKLR and *Donald Odeke v fidelity Security Ltd* Cause No 1998 of 2011.
10. On its part, the respondent submitted that the claimant's termination met the threshold under section 45 of the *Employment Act*. That there was overwhelming evidence pointing to the theft of the overall by the claimant. That the respondent therefore had a valid reason to terminate the claimant's employment. It was further submitted by the respondent that it observed procedural fairness as contemplated under the *Employment Act*. To support its arguments, the respondent placed reliance on the cases of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR and *George Okello v Unilever Kenya Limited* [2019] eKLR.

### **Analysis and Determination**

11. Arising from the pleadings on record, the evidence submitted before court and the opposing submissions, the court singles out the following issues for determination: -
  - i. Whether the respondent had a valid and fair reason to dismiss the claimant from employment



- ii. Whether the respondent complied with the procedural requirements in effecting the claimant's dismissal
- iii. Is the claimant entitled to the reliefs sought?

### **Valid and Fair Reason For Dismissal?**

12. The determination of this issue turns on the provisions of section 45(2) (a) and (b) of the [Employment Act](#), which provides as follows: -

- “(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employee's conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer...”

13. The question as to whether an employee's termination is valid and fair, is largely dependent on the circumstances of each case hence the test is quite subjective in a sense. It is therefore imperative to revisit the reasons for the claimant's dismissal and apply the same against the evidence on record.

14. The reasons for the claimant's dismissal are discernible from his letter of dismissal which is couched in part: -

“Re: Dismissal

Following statements from witness, it is clear you were in possession of two overall (*sic*) one belonging to Matthew Kyalo. On September 23, 2016, you sold Matthew's overall to Mr Philip Maina Kariuki at Kshs 200.

Stealing is a serious offence and the company has no alternative than to dismiss you...”

15. It bears from the record that this had been precipitated by a written statement dated September 27, 2016 from Matthew Kyalo who stated as follows: -

“I reported to duty on September 12, 2016 from leave and found my overall was missing. I asked Derrick Amadi and he told me that Mr Chebai collected them from the generator room and gave them to Mr Paul who told me to collect it from the store. It was missing from the store. On 26<sup>th</sup> I saw it being worn by Mr Tony the welder. I asked him where he got it from and he told me that he bought from Jared (boiler operator) for Kshs 200. I have not taken it from him (Tony)...”

16. In another statement Philip Maina states as follows in regard to the overall issue: -

“I bought an overall from Mr Jared Nyakweba on Friday, 23<sup>rd</sup> 2016 at Kshs 200 little did I know that it had been stolen from his colleague Mr Matthew. This I came to learn on Monday 26<sup>th</sup> when the owner saw his overall which I had already put on. So when I asked



Jared this morning September 27, 2016 why he had sold me a stolen item he said that Matthew had send (*sic*) him to buy some overall where he bought the same colour....”

17. On his part, the claimant had this to say in his statement dated October 5, 2016 which reads in part: -

“...I thereafter realized that my overall was (illegible)of Matthew Kyalo since we bought the same size and colour...from there I took it while knowing it was mine after some days my friend Tony requested me if I have unused overall but not of the company of which I gave it to him and he overed (*sic*) me lunch willingly. So, the allegation of stilling (*sic*) the overall I don’t know and they have not shown me the different which will show the overall...”

18. It is also notable that the claimant testified during cross examination, that he did not know Philip Maina and Tony, yet he mentions the said Tony in his written statement. Further, he admitted that he had once given out an overall but he did not know the name of the person he gave it to. This is quite unbelievable as he had clearly indicated in his statement that he gave an overall to his friend “Tony”. It is therefore not convincing that he had forgotten this crucial piece of information.

19. It is further notable that although the claimant denied receiving any money after giving out the overall, he admitted that the said Tony bought him lunch.

20. From the foregoing, it is evident that: -

- i. an overall belonging to the claimant’s colleague by the name Matthew Kyalo was lost;
- ii. the lost overall was traced to an individual by the name Tony;
- iii. the claimant admitted giving out an overall to his friend Tony; and
- iv. the claimant also admitted that the said Tony bought him lunch.

21. Therefore, the grounds for the claimant’s dismissal revolved around the disappearance of the overall belonging to Matthew Kyalo. From the testimony accounts of the persons involved, the claimant was culpable. Regardless of whether he sold it for cash or in exchange for lunch, the disappearance was attributed to him and in fact, he admitted as much in his written statement and during his testimony before court.

22. It is notable that the applicable standard of proof is that of a balance of probability and not beyond reasonable doubt. Connected to this, section 43 (2) of the *Employment Act*, provides that the reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

23. Indeed, the Court of Appeal in the case of *Kenya Revenue Authority v Reuel Waitihaka Gitahi & 2 others* [2019] eKLR held as follows regarding the applicable standard of proof: -

“We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the *Act*. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.



The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. That is a partly subjective test.”

24. In following with the above determination which I wholly adopt, the respondent was not expected to prove beyond reasonable doubt that the claimant had indeed taken the overall and received money in exchange for the same. All it needed to prove was that based on the evidence presented, it had genuine reason to believe that the claimant had taken his colleague’s overall without permission and given it to a third party.
25. Following the testimony accounts, including that of the claimant himself in regards to the disappearance of the overall, the respondent had genuine reasons to believe that the claimant was culpable and was not an honest person hence it had valid and fair reason to dismiss him from employment.
26. It is for the foregoing reason that I am satisfied that the respondent discharged its burden of proof under Section 43 as read together with section 45 (2) (a) and (b) of the *Employment Act*.
27. That said, I now turn to consider the question of procedural fairness.

### **Procedural Fairness**

28. Proving a valid and fair reason is not all. An employer is required under section 45 (2) (c) of the *Employment Act*, to prove that it subjected an employee to a fair process prior to his or her termination from employment. Section 41(1) of the *Act* provides in an elaborate manner the requirements of a fair process. In particular, it requires an employer to notify an employee of the intended termination. Accordingly, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.
29. In terms of section 41(2), the same process applies to cases of summary dismissal. The said provision is as follows: -
  - “(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
30. From the record, the claimant was issued with a show cause letter which he responded to, but was not given an opportunity to appear for a hearing. This was confirmed by RW1 in her testimony.
31. In view of the nature of the allegations against the claimant and noting that there were other parties involved, this was a case that could not be solely determined through exchange of correspondence. The respondent ought to have invited the claimant to make an oral representation in the presence of a colleague or shop floor union representative. Failure to do that impacted negatively on the process it applied in effecting the claimant’s dismissal.
32. Needless to say, the respondent is at fault and the claimant’s dismissal was procedurally unfair.



## Reliefs?

33. As the court has found that the respondent had a valid and fair reason to dismiss the claimant but failed to adhere to the requirements of a fair process, I will award him three (3) month's gross salary as compensatory damages. This is further noting the length of the employment relationship.
34. The claimant is further awarded one (1) month's salary in lieu of notice as per the provisions of section 35 (1) (c) of the Employment Act.

## Orders

35. To this end, judgment is entered in favour of the claimant against the respondent and he is awarded: -
- a. Compensatory damages in the sum of Kshs 60,900.00 which sum is equivalent to three (3) months of his gross salary.
  - b. One (1) month's salary in lieu of notice being Kshs 20,300.00.
  - c. The total award is Kshs 81,200.00.
  - d. Interest on the amount in (c) at court rates from the date of judgement until payment in full.
36. The claimant shall also have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

### Appearance:

For the claimant Ms Alividsa

For the respondent Mr Macharia

Court Assistant Abdimalik Hussein

## ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under article 48 of the Constitution and the provisions of section 1B of the Civil Procedure Act chapter 21 of the laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

